Supreme Court, U.S.
FILED
APR 22 1993
OFFICE OF THE CLERK

No. 92-1547

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

TRANSCON LINES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Of Counsel
RICHARD S. BERGER
MARJORIE S. STEINBERG
GREGORY D. SCHETINA
TUTTLE AND TAYLOR,
A Law Corporation
355 South Grand Avenue
40th Floor
Los Angeles, CA 90071-3101
(213) 683-0600

JOSEPH L. STEINFELD, JR.*
ROBERT B. WALKER
JOHN T. SIEGLER
SIMS, WALKER & STEINFELD, P.C.
1275 K Street, N.W. Suite 775
Washington, D.C. 20005
(202) 842-1741
Counsel for Respondents

April 22, 1993

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS WHY WRIT SHOULD BE DENIED	5
CONCLUSION	15
APPENDIX	1a

TABLE OF AUTHORITIES

CASES Page

Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156 (1922) 6

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) ..... *passim*

Reiter v. Cooper, —— U.S. ——, 61 U.S.L.W. 4232 (U.S. Mar. 8, 1993) 6, 7, 11, 13

Southern Pacific Transportation Co. v. Commercial Metals, 456 U.S. 336 (1982) 5, 7, 8, 13, 14

Vedder J. White, et al. v. ICC, —— F.2d ——, No. 92-3528 (3d Cir. Mar. 19, 1993) 8

ADMINISTRATIVE DECISIONS

National Indus. Transp. League—Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99 (1986) 5, 11, 14

Nonoperating Motor Carriers—Collection of Undercharges, 8 I.C.C.2d 742 (1992) 8

Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates, 5 I.C.C.2d 623 (1989) 5, 11, 14

STATUTES

49 U.S.C. § 10101, *et seq.* 1, 3

49 U.S.C. § 10701(a) 6, 11

49 U.S.C. § 10743 11

49 U.S.C. § 10761(a) 3

49 U.S.C. § 10762(a)(1) 3, 12

49 U.S.C. § 11702(a)(4)(b)(6) 4

49 U.S.C. § 11705(b)(3) 11

49 U.S.C. § 11906 ..... 2, 13

REGULATIONS

49 C.F.R. § 1322 2

49 C.F.R. § 1320 1

49 C.F.R. § 1320.2(g)(2)(iii) 3

49 C.F.R. § 1320.2(g)(2)(vi) 3

49 C.F.R. § 1320.3(c) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1547

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

TRANSCON LINES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Transcon Lines and Leonard L. Gumport, Chapter 7 Trustee for the Estate of Transcon Lines, hereby request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit by Petitioner, Interstate Commerce Commission ("ICC" or "Commission") be denied.

STATUTES AND REGULATIONS INVOLVED

In addition to the provisions of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* and the ICC's credit regulations, 49 C.F.R. § 1320, set forth by Petitioner in its Appendix (App., 61a-74a), Respondents believe the following additional statutory provision is involved:

49 U.S.C. § 11906 Evasion of Regulation of Motor Carriers and Brokers

A person, or an officer, employee, or agent of that person that by any means knowingly and willfully tries to evade regulation provided under this subtitle for motor carriers or brokers shall be fined at least $200 but not more than $500 for the first violation and at least $250 but not more than $2,000 for a subsequent violation.

STATEMENT OF THE CASE

This case involves a suit by the ICC to enjoin Respondents, Transcon Lines and its bankruptcy trustee, Leonard L. Gumport ("Trustee"), from collecting filed tariff charges which the Commission contended could not be enforced because Transcon, while an active carrier, had violated the ICC's credit regulations. The Commission admitted that Transcon's tariff provision, upon which the Trustee had based his undercharge claims, was part of Transcon's filed rates and fully complied with the ICC's credit regulations. However, the ICC maintained that the Trustee could not collect undercharges based upon that tariff because Transcon had not complied with other, non-tariff, requirements set forth in the ICC's credit regulations.

The tariff provision at issue provided that discounts off Transcon's rates were conditioned upon a shipper's paying the rate within ninety days. Failure by a shipper to pay the full discounted rate within that time period resulted in a loss-of-discount penalty.[1]

---

[1] Transcon's loss-of-discount tariff provided in relevant part:

1. Allowances, discounts, exception classes and commodity rates shall apply only when tariff charges are paid within ninety calendar days from date of shipment.
2. The provisions of this rule do not change the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with ICC regulations, 49 C.F.R. 1322. This rule simply establishes a condi-

The Trustee admitted that Transcon did not comply with other provisions of the regulations which did not involve Transcon's tariffs. Specifically, the ICC claimed, and the Trustee did not dispute, that Transcon had failed to specifically state its loss-of-discount penalty in its original freight bills as required by 49 C.F.R. § 1320.3(c). Second, Transcon had not issued revised freight bills that included the undiscounted charges as liquidated damages within ninety days after the expiration of the authorized credit period as required by 49 C.F.R. § 1320.2(g)(2)(vi). Third, Transcon had not sent out individual bills to shippers seeking to apply the loss-of-discount penalty, and the Trustee, out of necessity, applied the loss-of-discount provision by aggregating freight bills in violation of 49 C.F.R. § 1320.2(g)(2)(iii).

The Trustee argued that the ICC's credit regulations could not be used to prevent his collection of Transcon's filed rate based upon this Court's decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). As a second ground for denying the injunction, the Trustee claimed that Transcon's entire discount scheme was illegal because the discounts were masked by secret numerical codes. Without a filed "key" to the shipper codes the discounts were not "published" as required by the Interstate Commerce Act ("the Act"), 49 U.S.C. § 10101, *et seq.*, and specifically 49 U.S.C. § 10762(a)(1). The Trustee, therefore, claimed that the ICC could not compel him to adhere to these discounts.

The district court agreed with the Trustee on both grounds finding that the ICC's credit regulations could not be enforced to the extent that they undermined the statutory filed-rate doctrine as codified at 49 U.S.C. § 10761(a). The district court went on to agree with

---

tion precedent for the application of the special tariff provisions described in paragraph 1 above.

(Vol. I, Resp. SER 41 (ICC TCON 103-A, item 210).)

the Trustee's second, alternate ground finding the discounts themselves violated the publication requirement of the Act and, therefore, could not be enforced. Thereupon, the district court denied the ICC's motion for summary judgment, and granted the Trustee's cross-motion for summary judgment, dismissing the case.

The ICC timely filed an appeal with the Ninth Circuit. On appeal, the Ninth Circuit affirmed the district court with regard to the dismissal of the ICC's injunction for Transcon's credit rules violation, but reversed the district court on the second ground involving the secretly coded tariffs.[2]

The court of appeals recognized that the ICC was authorized by statute to bring a civil action to enforce its regulations against motor carriers, including the trustees of bankrupt motor carriers. This enforcement power includes the power to seek an injunction pursuant to 49 U.S.C. § 11702(a)(4)(b)(6). However, the court of appeals said the Commission could not use its injunctive powers to enforce regulations in such a way as to undercut the filed rate requirement. "Regulations, however valid in other contexts, cannot furnish the reason for

---

[2] The Trustee is filing contemporaneously with this brief in opposition, a cross-petition seeking a writ of certiorari from the Ninth Circuit's judgment reversing the district court on the alternate ground. In the event that the Court deems it necessary to grant the ICC's petition, the Court should grant his cross-petition in order to ensure that both theories pled by the Trustee in defense to the ICC's injunction action are adequately reviewed. On the other hand, if the Court denies the ICC's petition, consideration of the alternate ground raised in the Trustee's cross-petition will remain outstanding. Since the validity of secretly coded rates does not involve interpretation of the ICC's credit regulations, this Court may properly reject the ICC's petition without prejudicing the ICC's right to oppose the Trustee's cross-petition.

letting a carrier abandon the filed rate." Pet. App., 19a.[3] The court of appeals found that the ICC improperly sought to enforce its credit regulations in a way that encourages and endorses "circumventing the filed rate requirements, for it would prevent the trustee from collecting the bureau rates in accordance with all of its filed rates." *Id.* The court of appeals concluded that if the ICC's injunctive action against the trustee's filed rate was allowed to stand, the ICC [would permit] "the very price discrimination the Act by its terms seeks to prevent." *Id.* citing *Maislin*, 110 S.Ct. at 2768. The ICC's broad interpretation of its regulations was rejected by the court of appeals as of no greater force and effect than the *Negotiated Rates* policy [4] rejected by this Court in *Maislin*. The court of appeals, therefore, affirmed the district court's judgment in favor of the Trustee as to the collection of undisclosed rates on overdue accounts. Pet. App., at 27a.

REASONS WHY WRIT SHOULD BE DENIED

The ICC concedes in its Petition that "[a] shipper cannot raise the carrier's violation of the credit regulations in defense to an action to collect the filed rate." Pet. at 5,[5] citing *Southern Pacific Transportation Co. v. Commercial Metals*, 456 U.S. 336 (1982). That being said, however, the ICC believes that it may somehow "step into the shoes" of the shipper and through an enforcement action utilize its credit regulations to preclude a carrier from enforcing its duly filed, and legal, loss-of-discount tariff

---

[3] Citations to the appendix submitted with the Petition are referred to as "Pet. App., ——;" citations to the appendix submitted with this Brief in Opposition are referred to as "Opp. App., ——."

[4] *See National Indus. Transp. League—Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986); *Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989).

[5] Citations to the petition for writ of certiorari are referred to as "Pet. at ——."

if the carrier fails to otherwise comply with the ICC's credit regulations. The underlying rationale behind the ICC's position is the ICC's view that it is unfair for a carrier to enforce its tariff unless the carrier repeatedly gives actual notice of the tariff provision to the shipper. Yet, as repeatedly recognized by this Court, "the filed rate governs the legal relationship between shipper and carrier." *Maislin*, 111 L.Ed.2d at 105. Moreover, "unless and until suspended or set aside, [the published tariff] is made for *all purposes*, the legal rate, as between carrier and shipper." *Id.* (*citing Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922)) (emphasis supplied).

The court of appeals correctly told the ICC what it was told previously by this Court in *Maislin*: The ICC has no power to enforce regulations in such a manner as to prevent carriers from enforcing their duly filed tariffs. In *Maislin*, the ICC asserted that its express statutory power to prohibit "unreasonable practices" pursuant to 49 U.S.C. § 10701(a) permitted it to prohibit a carrier from enforcing its filed tariff. The unreasonable practice was the carrier's attempt to collect its filed rate from a shipper after having negotiated with the shipper, and having billed the shipper, a rate different from the filed rate. In *Maislin*, this Court recognized that the carrier's practice of negotiating and billing unfiled rates was illegal and could subject the carrier to a civil and criminal penalties including the issuance of a cease and desist order (i.e. injunction). Yet, this Court held that the ICC could not prevent the carrier, or its bankruptcy trustee, from collecting the filed tariff. This Court explained: (1) the filed-rate doctrine is "utterly central" to the Interstate Commerce Act, so that (2) the ICC has no power to adopt rules requiring "adherence to unfiled rates . . . ." *Maislin*, 111 L.Ed.2d 94 at 112.

Notwithstanding the clear directive of *Maislin*, the ICC asserts that this Court's recent decision in *Reiter v. Cooper*,

—— U.S. ——, 61 U.S.L.W. 4232 (U.S. Mar. 8, 1993) somehow has modified the effects of *Maislin* with regard to the ICC's ability to prevent the enforcement of a carrier's filed rate. "The [filed rate] doctrine, however, does not defeat a shipper's claims and defenses that are specifically accorded by the [Act] itself." Pet. at 8, citing *Reiter*, slip op. at 7. Yet, just five pages earlier in its petition, the ICC correctly cites this Court's holding in *Southern Pacific Transportation Co. v. Commercial Metals, supra*, that a shipper cannot raise the carrier's violation of the ICC's credit regulations in defense of an action to collect the filed rate. Since a shipper cannot plead a carrier's violation of the credit regulations as a defense, it must not be a defense "specifically accorded by the Act itself." *Reiter* thus provides no assistance to the ICC's attempt to forge an end run around *Maislin*.

The ICC makes the incredible claim that the court of appeals decision, "[b]y stripping the ICC of authority to enforce its credit regulations within the Ninth Circuit . . . exposes thousands of shippers to claims that directly violate governing ICC regulations." Pet. at 9. Of course, the court of appeals decision does nothing of the sort. The court of appeals opinion in this case no more vitiates the ICC's statutory power over, and right to regulate, motor carrier credit than *Maislin* vitiated the ICC's statutory power over, and right to regulate, motor carrier practices. The ICC continues to be free to regulate the credit practices of all carriers throughout the United States, including those within the Ninth Circuit. The ICC may, and should, issue cease and desist orders and seek injunctions against carriers that violate its credit regulations. As noted by this Court in *Commercial Metals*:

> The ICC has ample authority to police the credit practices of carriers and thereby to deter improper practices. This authority includes the power to issue a cease-and-desist order, the power to seek a federal

> court injunction requiring the carrier to comply with the regulations, and the power to bring suit for the $5,000.00 civil forfeiture, provided by [the Act], for each knowing violation of an order of the Commission.

456 U.S. at 349-50 (citations omitted).[5]

The ICC also wrongly claims that the court of appeals opinion somehow allows carriers to "avoid ICC regulation by inserting contrary terms in their tariffs." Pet. at 9. This is untrue. The court of appeals correctly recognized that the loss-of-discount provision in Transcon's filed rate "was adopted after the 1988 amendment to the ICC regulations that specifically authorize such provisions." Pet. App., 20a. The court of appeals also recognized that it was confronted with an unambiguous, legally filed tariff: "there is a single filed tariff governing here: the rules tariff providing that the discount lasts only for 90 days after the date of shipment and that timely payment is a precondition of the discount." *Id.*

The ICC wrongly characterizes the court of appeals' opinion. The ICC should know better. At argument before the Ninth Circuit the following colloquy took place between court and counsel for the ICC:

> THE COURT: Right. And you say, is it your contention then that the tariff did violate the regulation requiring notice in effect in the bill of lading[?]

---

[6] Recently, the Third Circuit in *Vedder J. White, et al. v. ICC*, —— F.2d ——, No. 92-3528 (3d Cir. Mar. 19, 1993) rejected the ICC's attempt to utilize *Commercial Metals* to justify interfering with the collection of filed tariff charges by the bankruptcy trustee. In *Vedder J. White*, the Third Circuit set aside ICC regulations promulgated in *Nonoperating Motor Carriers—Collection of Undercharges*, 8 I.C.C. 2d 742 (1992). These illegal regulations operated to enjoin trustees from proceeding with undercharge actions unless preapproved by the ICC. The ICC has voted not to appeal *Vedder J. White*. See "Media Advisory, ICC Will Not Appeal Adverse Court Decision," *ICC News*, Mar. 31, 1993. Opp. App., 1a-2a.

> MR. RUSH: No. *We don't contend the tariff violated anything.* We contend that the tariff was one of the four things that had to be done in order to be released from the obligations to charge no more than the discounted rate.

Opp. App., 3a, 4a (emphasis supplied).

In light of this concession, there is no merit to the ICC's claim that the court of appeals decision enforcing the tariff "threatens to sow confusion in the application of the filed-rate doctrine." Pet. at 9.

The ICC also wrongly suggests that the court of appeals "erroneously extended *Maislin.*" Pet. at 10. The ICC attempts to distinguish *Maislin* by claiming that its injunction action does not recognize an equitable defense based upon a negotiated, unfiled rate. Yet, it is undisputed that the ICC's enforcement action would prevent the Trustee from collecting Transcon's duly filed rate. The Commission attempts to subvert the filed rate by calling the undiscounted rate a "credit term," which is "available only because ICC regulations authorize carriers to release goods without payment and then to define liquidated damages for late payment by reference to the non-discounted tariff rate." Pet. at 11-12. Yet the ICC again ignores the admissions of its own counsel.

Judge Hill requested counsel for the ICC to confirm on the record whether Transcon's "filed rate" included *all* of Transcon's filed tariffs. Counsel for the ICC conceded this point:

> THE COURT: For the purposes of interpreting *Maislin* and determining what the "filed rate" is, as the term is used in the filed-rate doctrine, I believe that the Defendant Trustee here is correct as it defines that term. Defendant defines the term "filed rate" to include *all* of Transcon's tariffs, including class rates, bureau rates, rules tariffs, and discount rates.

> Now, I would like to hear from you, Mr. Day, whether you take issue with that definition of the term "filed rate."
>
> MR. DAY: Your honor—
>
> THE COURT: Just that question.
>
> MR. DAY: Just that question. No, *I don't take issue with that at all.*

Pet. App., 44a-45a (emphasis supplied).

The court of appeals also properly dispensed with the ICC's claim that Transcon's loss-of-discount provision constituted "liquidated damages" which even though published in a tariff cannot be enforced unless the carrier complied with all provisions of the credit regulations. "Going by the filed rate as we must, there is a single filed tariff governing here: the rules tariff providing that the discounts last only for ninety days after the date of shipment and that timely payment is a precondition of the discount." Pet. App., 20a.

Since it is undisputed that Transcon's loss-of-discount provision was part of Transcon's filed rate and was lawful, it defies logic to assume that an injunction which prevents operation of a lawful and duly-filed tariff "would not interfere with enforcement of the filed rate." Pet. at 12.

The ICC's reliance on allegedly contrary court decisions is seriously misplaced. *See* Pet. at 12 n.11. The cited courts of appeals decisions are unpublished and not on point. As noted by the court of appeals, the earlier decisions by the Third and Fifth Circuits involved review of tariff provisions which were published in violation of then-existing ICC tariff regulations. In contrast, the Transcon tariff provision at issue in this proceeding are admittedly in compliance with the ICC regulations. *See* App., 20a; Opp. App., 3a-4a.

When forced to admit that Transcon's loss-of-discount provision is a duly-filed, legal rate, the ICC still wrongfully maintains that *Maislin* does not require compliance

with the filed-rate doctrine. Pet. at 12. Instead, the ICC opines that because *Maislin* contains the caveat that the filed rate "is not enforceable if the ICC finds the rate to be unreasonable" (citing 497 U.S. at 128), a filed rate is "not enforceable" if the ICC finds that the carrier violated its credit regulations. Pet. at 13. Of course, as this Court pointed out in *Reiter v. Cooper*, the exception for rate unreasonableness is limited to the "explicitly conferred" statutory right of a shipper to seek reparations. 49 U.S.C. § 11705(b)(3).

> We can agree with respondents that this latter category does not include any 'unreasonable-rate defense,' derived from the general ICA requirement (now codified in § 10701(a)) that a carrier's rates be 'reasonable.' But we cannot agree that the filed-rate doctrine precludes shippers from asserting (by way of claim *or* counterclaim) the reparations rights explicitly conferred by § 11705(b)(3).

Slip op. at 7 (citation omitted).

Here, the ICC can point to no "explicit" provision of the Act which would allow the Commission, through its enforcement powers, to provide a defense to shippers who failed to pay a carrier's filed rate charges even though the carrier violated the ICC's credit regulations. The general authority given to the ICC in the Act to regulate carrier credit, 49 U.S.C. § 10743, is not enough to overcome the provisions of the filed-rate doctrine.

This Court rejected the ICC's similar view that the ICC could require compliance with unfiled rates by reason of the ICC's statutory authority (49 U.S.C. § 10701(a)) to regulate unreasonable practices. *Maislin*, 111 L.Ed.2d at 104-05, 111-12. The ICC may not use its power under one part of the Act to undermine the Act's "utterly central" filed rate provisions. *Id.* "By sanctioning an adherence to unfiled rates, the ICC rule 'undermines the basic structure of the Act.'" *Maislin*, 111 L.Ed.2d at 112. It made no difference that the *Negotiated Rates*

policy was a purported *remedy* "to comply with § 10762's directive to file the negotiated rate with the ICC." *Maislin,* 111 L.Ed.2d at 111. Nevertheless, the ICC now claims the court of appeals erred when it similarly stated that the Commission could not use its credit provisions promulgated pursuant to the Act in an equally illegal attack on the "utterly central" filed rate provisions.

Finally, the ICC strongly suggests that there is some nationwide plague of loss-of-discount cases which demands that this Court reverse the sound decision of the court of appeals. The Commission states:

> Millions of shippers around the country rely on the ICC's credit regulations in arranging transportation with motor carriers. Under the court of appeals' decision, however, the ICC has no effective remedy to enforce compliance with those regulations. . . . The court of appeals' ruling creates a particularly serious threat, because it calls into question whether shippers can rely on any aspect of ICC regulations regarding interstate transportation.

Pet. at 16.

The court of appeals addressed this improper claim of the ICC's as well:

> The equities here are not necessarily with the late-paying shippers. They enjoyed an extension of credit by the carrier while the carrier became insolvent. It is not unfair to make them now contribute to the payment of the carrier's unsecured creditors. But under *Maislin,* we need not balance equities. The filed rate is decisive.

Pet. App., 20a-21a.

It is almost laughable for the ICC to state that it "has no effective remedy" to enforce compliance with its credit regulations unless it prevents a trustee from enforcing a bankrupt motor carrier's loss-of-discount provision. The ICC has forgotten, or chosen not to use, all of the enforce-

ment powers enunciated by this Court in *Commercial Metals*. Those enforcement powers are unaffected by the decision in this case. Also, the ICC remains free to authorize or prohibit the use of loss-of-discount tariffs. But the ICC cannot have it both ways: the ICC cannot authorize carriers to file loss-of-discount tariffs *and* simultaneously preclude carriers from enforcing those tariffs as required by *Maislin*. The ICC can also use its regulatory powers to require carriers while still active to cease and desist illegal acivity as it should have done in the case of Transcon. For example, the ICC can compel operating carriers to rebill all shippers in compliance with its regulations. The ICC could also seek to issue fines to the operating individuals in charge of the carrier at the time the carrier failed to comply with the ICC's regulations. 49 U.S.C. § 11906. To fine individuals rather than deprive creditors of valuable estate assets would send a serious message which would prevent abuse in the future. What the ICC cannot do is prevent carriers and their trustees from enforcing lawful filed rates.

The ICC claims the proper course to follow is for this Court to vacate the court of appeals' judgment and remand the case for further consideration in light of *Reiter v. Cooper*. Pet. at 18. However, *Reiter v. Cooper* provides no support for the ICC's view that the ICC may enjoin the operation of a duly filed, legal tariff. *Reiter* addresses only a shipper's right to assert by way of a recoupment counterclaim the right of reparations "explicitly" afforded by the Act. All shippers who receive undercharge claims based on Transcon's loss-of-discount provision will still have that same right and there is nothing in the court of appeals' decision which implies the contrary.

In the alternative, by way of footnote, the ICC suggests that this Court might consider "summary reversal of the judgment" in view of this Court's "recognition" in *Commercial Metals* that the ICC has injunctive powers to enforce its credit regulations. Pet. at 18, n.18. How-

ever, the court of appeals decision does not conflict with *Commercial Metals*. *Commercial Metals* denied shippers the right to utilize a violation of the ICC's credit regulations as a defense to the carrier's collection of the filed rate. There is nothing within *Commercial Metals* which would allow the ICC to "step into the shoes" of the shipper and provide the shipper with the same defense by way of an injunctive action.

Commercial Metals also states that the ICC, as opposed to the shipper, has the statutory power to enforce credit regulations. 456 U.S. at 349. *Commercial Metals* does *not* address the issue of whether the ICC can enforce its regulations by way of injunction in such a way as to violate the filed-rate doctrine. This Court resolved that issue eight years later in *Maislin*. The ICC may not use its regulatory powers, whether it be under the unreasonable practices provision or the credit provisions of the Act, to undermine the "utterly central" filed rate provisions of the Act. For the same reason that this Court invalidated the ICC's illegal *Negotiated Rates* policy, the court of appeals correctly declined to enforce the ICC's credit regulations in the manner requested by the Commission.

CONCLUSION

Because the court of appeals was right, and because thousands of Transcon's creditors and former employees are entitled to have the Trustee recover Transcon's filed rate charges, this Court should deny the ICC's Petition for Writ of Certiorari.

Respectfully submitted,

Of Counsel
RICHARD S. BERGER
MARJORIE S. STEINBERG
GREGORY D. SCHETINA
TUTTLE AND TAYLOR,
A Law Corporation
355 South Grand Avenue
40th Floor
Los Angeles, CA 90071-3101
(213) 683-0600

JOSEPH L. STEINFELD, JR.*
ROBERT B. WALKER
JOHN T. SIEGLER
SIMS, WALKER & STEINFELD, P.C.
1275 K Street, N.W. Suite 775
Washington, D.C. 20005
(202) 842-1741
Counsel for Respondents

April 22, 1993

* Counsel of Record

APPENDIX

APPENDIX

APPENDIX

ICC News—March 31, 1993

Interstate Commerce Commission
ICC NEWS
12th & Constitution Avenue NW. Washington, DC 20423

For Release:
Wednesday, March 31, 1993
No. 93-89

Contact: Alvin H. Brown
(202) 927-5350
TDD: (202) 927-5721

MEDIA ADVISORY

ICC WILL NOT APPEAL ADVERSE COURT DECISION; WILL EXPLORE OTHER MEANS TO PREVENT SHIPPER ABUSE

Interstate Commerce Commission Chairman Gail C. McDonald announced today that the Commission has decided not to seek further review of the decision of the United States Court of Appeals for the Third Circuit, issued March 19, 1993, in *White v. United States and ICC*, setting aside the Commission's Ex Parte MC-208 Rules that set up a prescreening process for certain categories of undercharge claims. Rather, as suggested by the court, the Commission intends to focus its efforts on reformulating the rules to protect the victims of abusive collection practices in a manner that will satisfy the court, and determining whether to seek appropriate legislation.

In the Ex Parte MC-208 Rules, the Commission attempted to directly supervise rebillings by carriers that are no longer operating, by requiring those carriers to get its pre-clearance for certain undercharge claims, so that the agency could weed out those that do not have any basis under the Interstate Commerce Act. In *White*, the court

concluded that the Commission does not have broad enough authority to screen claims in this manner. However, the court acknowledged the gravity of the undercharge situation and suggested that the Commission either reformulate the Ex Part MC-208 Rules in a manner that avoids any agency adjudication of claims or seek legislation clearly conferring upon the agency the authority it sought to exercise. The Commission intends to fully explore both of these avenues.

The Third Circuit decision was issued in *Vedder J. White et al. v. United States and Interstate Commerce Commission*, No. 92-3528 et al. The Ex Parte MC-208 Rules were adopted in *Non-Operating Motor Carriers—Collection of Undercharges*, 8 I.C.C. 2d 742 and I.C.C. 2d 35 (1992).

Copy of Excerpt of Unofficial Transcript of Oral Argument of *ICC v. Transcon* on April 8, 1992 Concerning: The Lawfulness of Transcon's Loss-of-Discount Tariff

---

BY THE COURT:

Well as I understand it, I want to clarify something—as I understand it in 1988 the Commission adopted a regulation that expressly authorized loss of discount provisions.

MR. RUSH:

As a measure of liquidted damages for the need to collect, yes Sir.

BY THE COURT:

And at that point the regulations did not include did they these detailed notice and rebilling requirements.

MR. RUSH:

From 1985 the regulations required that if you were going to impose any penalty that the exact amount and nature and how it came into being must be shown on your bill of lading so that much existed in 1988 because it was there from 1985. The other two provisions were adopted in 1989. The rebilling and the no aggregate batch assertion requirements.

BY THE COURT:

Alright. So the filed rate could not have violated those particular regulations—the latter regulations you were describing at the time of the filing.

MR. RUSH:

No because it was filed in 1987.

BY THE COURT:

Right. And you say, is it your contention then that the tariff did violate the regulation requiring notice in effect in the bill of lading.

MR. RUSH:

No. We don't contend the tariff violated anything. We contend that the tariff was one of four things that had to be done in order to be released from the obligation to charge no more than the discounted rate.

* * * *